



RAD File No. / N° de dossier de la SAR : MB3-04439

Private Proceeding / Huis clos

Reasons and Decision - Motifs et décision

Appellant	XXXXX XXXXXXXXXXXX XXXX	Appelant
Appeal considered/heard at	Montréal, Quebec	Appel instruit à
Date of Decision	January 23, 2014	Date de la décision
Panel	Normand Leduc	Tribunal
Counsel for the Appellant	M ^e Marie-Josée Blain	Conseil de l'appelant
Designated Representative	N/A	Représentant désigné
Counsel for the Minister	N/A	Conseil du ministre

REASONS AND DECISION

INTRODUCTION

[1] XXXXX XXXX XXXXX , a citizen of India, is appealing against the decision of the Refugee Protection Division (RPD) rejecting his claim for refugee protection.

[2] He presented no new evidence and is not requesting that a hearing be held before the Refugee Appeal Division (RAD).

DETERMINATION OF THE APPEAL

[3] Pursuant to subsection 111(1) of the *Immigration and Refugee Protection Act* (IRPA), the RAD confirms the determination of the RPD, namely, that XXXXX XXXX XXXXX is neither a “Convention refugee” under section 96 of the IRPA nor a “person in need of protection” under section 97 of the IRPA.

BACKGROUND

[4] The appellant is a 36-year-old man, originally from the state of Punjab in India. He is married and the father of two children. He alleged before the RPD that he had engaged in homosexual relations with a friend named XXXXX .

[5] The appellant alleged that, on XXXXX XX, 2013, he and XXXXX were caught during one of those intimate encounters by members of XXXXX family, who then threatened them and hit them. The appellant alleged that it was at this time that his own family and the people close to him became aware of his homosexual activities.

[6] The appellant alleged that, on XXXXX XX, 2013, he was arrested and detained by the police. He alleged that the police tortured him and accused him of having ties with militants, in addition to questioning him about his relationship with XXXXX . On XXXXX , 2012, after his family and others from his village became involved and paid a bribe, he was apparently released

on condition that he report to the police station each month starting on the following April 1. The police allegedly took his fingerprints and forced him to sign a blank document.

[7] The appellant alleged that, out of fear, he went to stay with an uncle in a village in the state of Haryana in XXXXX 2013, after XXXXX visit. He apparently learned that the police and members of XXXXX 's family were looking for him, since XXXXX too had left his home.

[8] The appellant left his country for Canada on XXXXX , 2013, with the help of an [translation] "agent" who apparently provided him with false travel documents. He claimed refugee protection there, stating that, in India, he was afraid of the police and of the members of XXXXX 's family who had lodged a complaint against him.

[9] The RPD rejected his claim for refugee protection on the ground that the appellant's essential allegations were not credible.

[10] Before the RAD, the appellant submits that the RPD erred in its assessment of his credibility by finding that there was a contradiction in his testimony regarding the reasons he had decided to leave his country, that there was a contradiction in the evidence presented regarding the name of the village where he had sought refuge in India, that there was a contradiction in his testimony regarding the number of people who had secured his release from police detention and that there was a contradiction in his testimony regarding the date he first had physical contact with XXXXX .

[11] For those reasons, the appellant is requesting that the RAD set aside the determination of the RPD and grant him refugee protection.

STANDARD OF REVIEW

[12] The IRPA does not expressly set out the standard of review that the RAD should apply when reviewing RPD decisions, nor is that standard of review set out explicitly in the case law. The appellant also does not suggest a standard of review in his memorandum.

[13] In *Dunsmuir*,¹ rendered in 2008, the Supreme Court of Canada revisited the foundations of judicial review and the standards of review applicable in various situations. In order to simplify the analysis, the Supreme Court determined that there should now be only two standards of review: correctness and reasonableness.

[14] Although the RAD does not conduct judicial reviews of RPD decisions, but rather acts as an appellate body within the same administrative tribunal, the IRB, I am of the opinion that without more direct guidance from the higher courts, the principles developed in *Dunsmuir* may be applied to the RAD.

[15] Paragraph 51 of the Supreme Court's decision in *Dunsmuir* states that "...questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness."

[16] In the case at hand, I am of the opinion that the question of whether the RPD erred in its assessment of the appellant's credibility is a question of fact. I will therefore apply the standard of reasonableness.

[17] At paragraph 47 of *Dunsmuir*, the court states that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Judicial deference is therefore required, and deference must be given to the RPD decision.

¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9, (2008) 1 SCR 190.

ANALYSIS

[18] The issue in this case is whether the RPD erred in assessing the appellant's credibility.

[19] In its reasons, the RPD concluded that the appellant was not a credible witness and that it did not believe his story, for the following reasons:

1. The RPD found a contradiction between the appellant's testimony that he decided to leave his village to seek refuge in the state of Haryana because he was afraid of the police and of XXXXX's family and his written statement in his Basis Of Claim Form (BOC Form) that he left his village in fear after XXXXX visited him at home (see paragraphs 14 to 16 of the RPD reasons).
2. The RPD found a contradiction between the appellant's testimony that the name of the village to which he fled was XXXXX and the written statement in his BOC Form that the name of the village was XXXXX. The RPD found that the appellant's explanations—that he [translation] "thought he might have been mistaken and that his memory is not good"—were unreasonable (see paragraph 17 of the RPD reasons).
3. The RPD found a contradiction between the appellant's testimony that, when in detention, he confessed to the police that he had had sexual relations with XXXXX, and his statement in his BOC Form that he had not confessed that to the police, even under torture. The RPD found that the appellant's explanations—that he meant to state in his testimony that he thought the police already knew about his relationship with XXXXX and that the police wanted him to confess to it—were unreasonable (see paragraphs 18 and 19 of the RPD reasons).

4. The RPD found a contradiction in the appellant's testimony about the number of people who apparently intervened to secure his release from police detention. The appellant first mentioned that four or five people were involved. When questioned about it in more depth, he mentioned five or six people (see paragraph 20 of the RPD reasons).
5. The RPD found a contradiction in the appellant's testimony about the date on which he allegedly first had physical contact with XXXXX . When questioned on the matter, the appellant first replied that it was XXXXX , 2013, then that he did not recall either the date or the year, and finally, when questioned by his counsel, that it was in 2012 (see paragraph 21 of the RPD reasons).
6. The RPD found a contradiction between the appellant's testimony that the name of the agent who organized his travel to Canada was XXXXX and his statement to an immigration officer on his arrival in Canada that the agent's name was XXXXX XXXX. The RPD found that the appellant's explanations—that the agent gave him different names, the last of which was XXXXX —were unreasonable (see paragraph 22 of the RPD reasons).
7. The RPD found a contradiction in the a XXXXX pellant's testimony about obtaining his birth certificate, issued on April 11, 2013. The appellant first testified that his uncle went to get the certificate at the issuing office and gave it to the appellant's mother, who sent it to him in Canada. Then he changed his testimony when confronted with the question of whether his uncle could have obtained the birth certificate given that the appellant was wanted by the authorities. He then stated that the certificate had been mailed to his home in India and that his mother had given it to his uncle, who had sent the document to him in Canada (see paragraphs 23 to 25 of the RPD reasons).

8. The RPD found a contradiction between the appellant's testimony that his parents, his wife and his children were still in the family home in India and that he was in contact with them and the content of the affidavit from the mayor (Sarpanch) of his village submitted as evidence that the family had left the village and lived in different places. The RPD found that the appellant's explanations—that the family sometimes left the village and then returned—were unreasonable (see paragraph 26 of the RPD reasons).
9. The RPD found that the appellant's credibility regarding his sexual orientation was [translation] "significantly undermined" because he testified that he was now more attracted to men but that he would like his wife and children to join him in Canada if his claim for refugee protection was allowed and that he did not want a divorce (see paragraphs 27 to 31 of the RPD reasons).

[20] In his memorandum, the appellant submits that the RPD erred on four of the nine points listed above, points that it used as a basis for finding that he lacked credibility.

[21] I concur with the appellant's submission that errors were made with respect to points 1 and 4.

[22] In my opinion, it was not reasonable for the RPD to conclude that there was a contradiction in the appellant's testimony about the reasons he left his village, because it seems reasonable to me to believe that his fear after XXXXX 's visit, which was not specified on his BOC Form, could very well be a fear of XXXXX family and of the police, as he testified at the hearing.

[23] I am also of the opinion that it was not reasonable for the RPD to conclude that the number of people who supposedly became involved in securing his release was a contradiction that undermined the appellant's credibility. It seems to me that the appellant's initial response that there were four or five people was really only an estimate and that, after having made a list

of them at the RPD's request, the fact that he stated that there were five or six people is not a contradiction that is clear and significant enough to undermine his credibility.

[24] However, I find that it was open to the RPD to draw negative inferences from the contradiction regarding the name of the village in which the appellant allegedly hid before leaving his country. I am of the opinion that this is an important aspect of the claim for refugee protection. All through his testimony, the appellant called the village by a name different from the one in his BOC Form. I also add that the appellant must have been well aware of the village and its name because his uncle, in whose house he had supposedly taken refuge, lived there.

[25] I find that it was also open to the RPD to draw negative inferences from the appellant's testimony about the date of the first physical contact between himself and XXXXX . Once again, this was an important aspect of the claim, a claim based on his homosexual relationship with XXXXX . Although the RPD could perhaps not require an exact date, it could expect an approximate date, rather than the vague and contradictory testimony it noted in its reasons.

[26] Finally, there are five other points on which the RPD relied and that the appellant does not contest in his memorandum. In my opinion, some points are more significant than others, such as whether he confessed to the police about his relationship with XXXXX (number 3), and his family's situation in India (number 8). Given the lack of any clarification of these points by the appellant, I see no grounds for intervention on the part of the RAD.

[27] In any event, while I am not stating that I would have come to the same conclusion as the RPD, I conclude that, overall, the RPD's decision is reasonable because it is transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

REMEDIES

[28] For these reasons, I confirm the determination of the RPD, namely, that XXXXX XXXX XXXXX is not a “Convention refugee” or a “person in need of protection.”

[29] The appeal is dismissed.

Normand Leduc

Normand Leduc

January 23, 2014

Date

IRB translation

Original language: French